Supreme Court, U. S.
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DEC 2 1974

No. 74-687

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS W. MOORE, JR., ASSIGNEE FOR BENEFIT OF CREDITORS OF EMSCO SCREEN AND PIPE COMPANY, AND EMSCO SCREEN AND PIPE COMPANY OF TEXAS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	3
Reasons for granting the writ	6
Conclusion	13
Appendix A	15
Appendix B	25
Appendix C	27

CITATIONS

Cases:

Beaston v. *Farmers' Bank*, 12 Pet. 102	7, 8
Bramwell v. *United States Fid. & Guar. Co.*, 269 U.S. 483	7, 8
Chestnut St. Trust & Saving Fund Company's Assigned Estate, in re, 217 Pa. 151, 66 Atl. 322	9
Jones v. *Cooper*, 2 Aikens 54, 16 Am. Dec. 678	9
King v. *United States*, 379 U.S. 329	5, 7, 10, 11
Massachusetts v. *United States*, 333 U.S. 611	9
Phillips v. *Runnells*, 43 Am. Dec. 109	8
Price v. *United States*, 269 U.S. 492	7
Ross v. *Milne*, 37 Am. Dec. 646	8
Small Business Administration v. *McClellan*, 364 U.S. 446	5, 7
United States v. *Barnes*, 31 Fed. 705	5, 8–9, 11
United States v. *Bryan*, 9 Cranch 374	8
United States v. *Emory*, 314 U.S. 423	7, 11
United States v. *Fisher*, 2 Cranch 358	8
United States v. *National Sur. Co.*, 254 U.S. 73	10
United States v. *State Bank*, 6 Pet. 29	5, 7, 8, 9, 13
Viles v. *Commissioner*, 233 F. 2d 376	8

564-032—74——1

	Page
Statutes:	
Act of March 3, 1797, as amended, 1 Stat. 515, Sec. 5	2, 6
31 U.S.C. 191	2, 4, 5, 6, 11
Act of March 2, 1799, as amended, 1 Stat. 676, Sec. 65	2, 7
31 U.S.C. 192	2, 4, 5, 6
Bankruptcy Act, 30 Stat. 544, as amended, 11 U.S.C. 1, *et seq.*:	
11 U.S.C. 93(d)	5, 10
11 U.S.C. 93(h)	11
11 U.S.C. 95(b)	11
11 U.S.C. 103(a)(8)	5, 10
11 U.S.C. 103(a)(4)	10
11 U.S.C. 104(a)(5)	5, 10, 12
Revised Statutes:	
Sec. 3466	6
Sec. 3467	6
Miscellaneous:	
Holmes, *The Common Law* (1881)	12
1 R.C.L. 336 (1914)	8

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra,* 15–24) is reported at 497 F. 2d 976. The order of the district court (App. C, *infra,* 27–30) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 26, 1974 (App. B, *infra,* 25–26). On October 16, 1974, Mr. Justice Powell extended the time for

filing a petition for a writ of certiorari to November 23, 1974, and on November 18, 1974, he further extended the time to December 9, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an obligation to the United States arising from a government contractor's breach or default occurring prior to its insolvency is disentitled to the statutory priority for "debts due to the United States" solely because the amount owing has not been finally ascertained at the time of the insolvency.

STATUTES INVOLVED

Section 5 of the Act of March 3, 1797, 1 Stat. 515, as amended, 31 U.S.C. 191, provides:

> Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

Section 65 of the Act of March 2, 1799, 1 Stat. 676, as amended, 31 U.S.C. 192, provides:

> Every executor, administrator, or assignee, or other person, who pays, in whole or in part,

> any debt due by the person or estate for whom or for which he acts before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate to the extent of such payments for the debts so due to the United States, or for so much thereof as may remain due and unpaid.

STATEMENT

The facts are undisputed and are summarized in the court of appeals' opinion (App. A, *infra*, 15–24).[1] In June 1966, Emsco Screen and Pipe Company of Texas, Inc. ("Emsco") entered into three government contracts. One was with the Navy to supply certain fabricated items for a contract price of $210,231.18 with deliveries to commence October 1966 and end during June 1967. On August 5, 1966, Emsco notified the Navy that the contract would be "impossible to perform" unless progress payments not then called for by the contract could be made.[2] The Navy treated Emsco's letter as a repudiation and abandonment of the contract and formally terminated the contract on August 31, 1966. On November 23, 1966, the Navy reprocured the contract with excess costs of $40,607.13 (not including interest).

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[1] The facts are set forth in detail in a stipulation of the parties dated May 28, 1973, and the opinion of the Armed Services Board of Contract Appeals (Nos. 11917, 12184), dated May 29, 1969, disposing of respondent Emsco's claim concerning one of the contracts involved here.

[2] A full statement of the difficulties involved with the progress payments and Emsco's failure to deliver for the Navy is found in the opinion of the Armed Services Board of Contract Appeals.

In the second, Emsco contracted with the Army to deliver by December 1966 certain manufactured products for a contract price of $27,428. Emsco repudiated this contract too in August 1966 and did not deliver; the Army officially terminated the contract on December 6, 1966, with a claim due at that time of $4,272. The parties reached a settlement of $5,000 in 1968.

In the third, Emsco contracted with the Defense Supply Agency ("DSA") to supply certain products for a contract price of $72,637.50 to be delivered by August 1966. Since Emsco did not deliver, DSA terminated the contract on October 19, 1966, and reprocured on January 7, 1967, at an additional cost of $8,436.06. In 1968, settlement reduced the claim to $6,072.82.

On October 20, 1966, Emsco made a voluntary assignment for the benefit of creditors to respondent Thomas W. Moore, Jr., in which the United States did not join. On October 20, 1966, Emsco had $55,707.38 in assets and, in addition to the amount involved in this case, owed $5,992.73 to the City of Houston and $68,758.91 to 61 other creditors.[3] Emsco stipulated that its obligations, and in fact the claims of the 61 creditors consenting to the assignments were themselves greater than Emsco's assets.

In February 1972, the United States filed suit in the United States District Court for the Southern District of Texas against the assignee and Emsco claiming priority under 31 U.S.C. 191 and 192 for

[3] Respondents' brief in the court of appeals (pp. iii–vi) lists the 61 creditors and their claims under the voluntary assignment.

the debts due the Navy, Army, and DSA in the amount of $52,313.95, not including interest. The district court held that the United States had absolute priority for its three claims under 31 U.S.C. 191 and 192 (App. C, *infra*).

The court of appeals reversed, one judge dissenting. Relying upon the technical requirements for a common law action of debt in the 1790's, the majority, Judge Jones held that the claims "were not for fixed and certain amounts and presently payable" at the time of the voluntary assignment and that Sections 191 and 192 therefore did not grant the United States priority (App. A, *infra*, 17). Judge Coleman concurred in a separate opinion (*id.* at 19).

In his dissent, Judge Thornberry noted cases granting priority to the United States for claims wholly unliquidated at the time of insolvency[4] and relied on the principle that Sections 191 and 192 are to be liberally construed to protect government funds[5] (*id.* at 20, 22–23). He also suggested that analogous definitions in the Bankruptcy Act for debts and unliquidated claims should apply in this context (11 U.S.C. 93(d), 103(a)(8), and 104(a)(5)), and concluded that the majority's narrow construction of "debts" defeats the purpose of protecting government revenues (*id.* at 22, 23–24) and that a debt" under Sections 191 and 192 includes an obligation unliquidated at the time of insolvency "so long as the claim can be liquidated or estimated * * * within a reasonable time so as to

[4] *King* v. *United States*, 379 U.S. 329; *United States* v. *Barnes*, 31 Fed. 705 (S.D.N.Y.).

[5] *E.g.*, *Small Business Administration* v. *McClellan*, 364 U.S. 446, 451–452; *United States* v. *State Bank*, 6 Pet. 29, 35.

avoid undue delay in distributing the debtor's assets to the creditors'" (*id.* at 24).

REASONS FOR GRANTING THE WRIT

1. In holding that the federal priority statute, requiring that "debts [of an insolvent] due to the United States shall be first satisfied" (31 U.S.C. 191), applies only to obligations for which a common law action of debt could have been maintained in 1797, the court of appeals has given the important priority statute an unduly technical construction in conflict with the decisions of this Court and other courts of appeals and contrary to long-standing practice.

The provisions of 31 U.S.C. 191, giving priority to "debts due to the United States," and of 31 U.S.C. 192, imposing personal liability for the unpaid portion of such debts on a person who pays other debts of an insolvent first, to the extent of such payments, have both been in effect in essentially their present language since the earliest days of the Republic. Section 191 derives from Section 3466 of the Revised Statutes, which was in turn based on a 1797 enactment providing in pertinent part "[t]hat where any * * * person hereafter becoming indebted to the United States * * * shall become insolvent, or where the estate of any deceased debtor, in the hands of executors or administrators, shall be insufficient to pay all the debts due from the deceased, the debt due to the United States shall be first satisfied * * *." 1 Stat. 515.[6] Section 192 derives from Section 3467 of the Revised Statutes, which was based on a 1799 enactment providing that any executor, administrator or other person who paid debts of a person or estate prior to paying "debts [due] to the United States from such person or estate" was personally liable to the extent of such other payments for the unpaid portions of "debts so due to the United States." 1 Stat. 676.

[6] The statute also applied where a debtor having insufficient property to pay all debts made a voluntary assignment for the benefit of creditors, and in other specified circumstances.

The purpose of these priority provisions, which are to be construed *in pari materia* (see, *e.g.*, *King* v. *United States*, 379 U.S. 329, 334–336), has been repeatedly stated by this Court; it is "to secure an adequate revenue to sustain the public burdens, and discharge the public debts." *United States* v. *State Bank*, 6 Pet. 29, 35; see, *e.g.*, *Price* v. *United States*, 269 U.S. 492, 500; *United States* v. *Emory*, 314 U.S. 423, 426; *Small Business Administration* v. *McClellan*, 364 U.S. 446, 452–453. Accordingly, the rule was early established by this Court that "there is no reason for giving to them a strict and narrow interpretation" (*United States* v. *State Bank, supra*, 6 Pet. at 35), and they are to be "liberally construed" in the government's favor. *Beaston* v. *Farmers' Bank*, 12 Pet. 102, 134; *Bramwell* v. *United States Fid. & Guar. Co.*, 269 U.S. 483, 487; *Price* v. *United States, supra*, 269 U.S. at 500; *United States* v. *Emory, supra*, 314 U.S. at 426.

In particular, this "purpose is not to be defeated by unnecessarily restricting the application of the word 'debts' within a narrow or technical meaning." *Price* v. *United States, supra*, 269 U.S. at 500. Rather, "[a]ll debtors to the United States, whatever their character, and by whatever mode bound, may be fairly included within the language" of these pro-

564-032—74——2

visions. *Beaston* v. *Farmers' Bank, supra,* 12 Pet. at 134. And, "[t]here exist now the same reasons for a liberal construction of the priority act as when the rule was laid down." *Bramwell* v. *United States Fid. & Guar. Co., supra,* 269 U.S. at 487; see *Viles* v. *Commissioner,* 233 F. 2d 376, 380 (C.A. 6).

The court of appeals, in giving the term "debt" a highly technical meaning limited to "liquidated" claims or other "claims * * * for sums certain or which could be made certain by mathematical computation" as of the date of insolvency (App. A, *infra,* 17), is in conflict with the foregoing well-established general principles. It also conflicts with decisions of this Court holding that an obligation may be a "debt due to the United States" even though, at the critical date of insolvency, it has not fully matured or is not yet fixed in amount. *E.g., United States* v. *Bryan,* 9 Cranch 374, 386; *United States* v. *State Bank, supra,* 6 Pet. at 36–39.[7] Indeed, nearly a century ago it had been established that the priority statute "extends to all classes of debts, whether liquidated or unliquidated, joint or several, legal or equitable * * *" (*United States* v. *Barnes,* 31 Fed. 705, 707 (C.C. S.D. N.Y.)), including claims of the United States that at

[7] The court of appeals' assumption that "debts" include only liabilities enforcible in a common law action for debt would also appear to be contrary to *United States* v. *Fisher,* 2 Cranch 358, where Chief Justice Marshall held the 1797 priority statute applicable to the endorser of a bill of exchange of which the United States was the holder, without regard to whether such a claim would have been cognizable in an action for debt, as opposed to assumpsit. Cf. *Phillips* v. *Runnels,* 43 Am. Dec. 109, 111 (Iowa); *Ross* v. *Milne,* 37 Am. Dec. 646, 653 (Va.); 1 R.C.L. 336–337 (1914).

the date of the insolvency were disputed and in litigation. *Ibid.*

In *United States* v. *State Bank, supra,* the Court indicated that the priority statutes, referring as they do to deceased debtors, could properly be construed by reference to the law concerning decedents' estates. 6 Pet. at 37. In that area as well, obligations have long been regarded as "debts due" from the decedent debtor even though the amount has not been ascertained at the time of death, nor the time for payment arrived (*e.g., Jones* v. *Cooper,* 2 Aikens 54, 56–57, 16 Am. Dec. 678, 681 (Vt.)), so that an action for debt would not have lain at the critical date. It is sufficient that a creditor's claim, even one for a breach of contact, may be subject of valuation (*ibid.*), even if a trial might be required. Cf. *In re Chestnut St. Trust & Saving Fund Company's Assigned Estate,* 217 Pa. 151, 155; 66 Atl., 332, 333.

In fact, in other cases this Court has sustained application of the priority statutes to "debts due"

[8] The dictum in *Massachusetts* v. *United States,* 333 U.S. 611, relied upon by Judge Coleman in his concurrence (App. A, *infra,* 19), is not to the contrary. There, in reconciling the provisions of the priority statute with certain specific provisions of the Internal Revenue laws and rejecting the government's claim of a "conditional priority," the Court observed in passing that "it is at least doubtful on the statute's wording that obligations wholly contingent for ultimate maturity and obligation upon the happening of events after insolvency can be said to fall within the reach of 'debts due' as of the time in insolvency." 333 U.S. at 626–627. However, where, as here, an insolvent had already repudiated, defaulted, or otherwise breached its contract prior to the insolvency, the liability to the United States is not "wholly contingent" upon post-insolvency events.

to the United States that were very similar to Emsco's obligations here. For example, both *United States* v. *National Sur. Co.*, 254 U.S. 73, and *King* v. *United States, supra,* involved debts based on defaults of government contractors, although the present point was apparently not in issue.

2. The decision of the court of appeals is important because it will have a significant adverse impact upon the efforts of the United States to protect its revenues. Under the bankruptcy laws, "debts" that may be proved include "contingent debts and contingent contractual liabilities" (11 U.S.C. 103(a)(8)), and "claims for anticipatory breach of contracts, executory in whole or in part * * *." 11 U.S.C. 103(a)(9). Moreover, such claims may be allowed if "capable of liquidation or of reasonable estimation * * * [without] unduly delay[ing] the administration of the estate * * *." 11 U.S.C. 93(d). In addition, the fifth priority in payment (before payment of other debts or claims of creditors) is given to "debts * * * owing to any person, including the United States, who by the laws of the United States is entitled to priority * * *." 11 U.S.C. 104 (a)(5).

Where bankruptcy proceedings have been commenced against a government contractor, it has been the long-standing practice of the United States to file preliminary or contingent claims, in cases like the present one, with the amount owing to be amended or established in accordance with the results of reprocurement, where appropriate, or disposition of a claim for breach of contract, either by negotiation or litigation. When the United States files such claims they

have routinely been allowed and accorded their priority. *E.g., King* v. *United States, supra.*[9]

Where bankruptcy proceedings have not been initiated[10] (*e.g.,* in cases involving general assignments for creditors, general receiverships, liquidations of insolvent corporations, insolvent decedents' estate), the United States may rely instead upon the priority established by Section 191. *United States* v. *Emory, supra,* 314 U.S. at 427–429. In such cases the claims of the United States have likewise heretofore been respected and accorded priority, though they be uncertain in amount at the time of insolvency.

In either case, the principal advantages conferred upon the United States by the priority statutes are not only the right to payment before other creditors, but also the right to have its interests protected by the assignee, trustee, executor, or other person in charge of the insolvent's estate. The court of appeals' constriction of the scope of the priority statute would therefore mean that a significant portion of the government's claims against contractors which, due to the priority, have heretofore been fully or substantially satisfied, would be paid only to the extent of the ratable share of the estate remaining, if any, for distribution

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[9] Sometimes the claim is not filed until after the precise amount due has been ascertained. *E.g., United States* v. *Barnes, supra;* cf. 11 U.S.C. 93(f).

[10] The United States cannot always insist that bankruptcy proceedings be instituted, because, if twelve or more creditors have claims, an involuntary bankruptcy petition may be filed only by three or more creditors having provable liquidated claims, not contingent as to liability, amounting in the aggregate to $500 in excess of the value of any securities held by them. 11 U.S.C. 95(b).

among nonpriority priority creditors.[11] In addition, the United States would be obliged to participate more actively in the proceedings to protect its interest, thereby incurring additional administrative burdens and expenses.

Under the court of appeals' decision, the determination as to whether the government may rely upon the priority statutes to protect its interests would seem to depend upon a judgment whether the obligation in issue would have been a proper subject of a common law action for debt in 1797. Delineation of the arcane distinctions between debt, assumpsit, and other common law forms of action (cf. Holmes, *The Common Law* 251–271, 275–288 (1881)) may be an appropriate task for scholars, but it is plainly an unworkable test for practicable application by government officers, executors, bankruptcy trustees, or others affected by the priority statutes.

Even if the decision below were inapplicable to claims of the United States presented in bankruptcy proceedings,[12] its consequences would be undesirable,

[11] With respect only to the specific type of contract claim involved in this case—nonperformance requiring reprocurement—the Department of Defense alone estimates that claims totalling several million dollars arise annually. While insolvency is not always the cause for such defaults, it is frequently a problem. The government's other breach of contract claims against companies that become insolvent would also be affected by the decision below.

[12] The present case does not involve a bankruptcy proceeding and the court did not address the consequences of its decision for the government's right to priority under the bankruptcy laws (11 U.S.C. 104(a)(5)), which is in turn dependent upon its right to priority under federal law. Whether the explicitly broader language of the bankruptcy laws (see p. 10, *supra*) would call for a different result in such a case is an open question.

for then insolvents might be induced to make a voluntary assignment for the benefit of creditors, before bankruptcy proceedings were begun, so as to aid its other creditors by reducing or eliminating the priority claims of the United States. This Court warned long ago that such assignments could be abused and held that the priority statutes should be construed to avoid that risk, especially where the construction protecting the government's interests is based on long-standing practice. *United States* v. *State Bank, supra,* 6 Pet. at 38–40.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1974.

APPENDIX A

In the United States Court of Appeals for the Fifth Circuit

No. 73–2951

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

THOMAS W. MOORE, JR., ASSIGNEE FOR BENEFIT OF CREDITORS OF EMSCO SCREEN PIPE COMPANY OF TEXAS, ET AL., DEFENDANTS-APPELLANTS

July 26, 1974

Appeal from the United States District Court for the Southern District of Texas.

Before JONES, THORNBERRY and COLEMAN, *Circuit Judges.*

JONES, *Circuit Judge.*

The facts from which this controversy arose were stipulated. In June, 1966, Emsco Screen Pipe Company of Texas entered into separate contracts with the Department of the Navy, the Department of the Army and the Defense Supply Agency for materials and supplies to be furnished thereafter. Emsco defaulted. The Navy terminated its contract on August 31, 1966. The Army terminated on December 6, 1966, and Defense Supply on October 19, 1966. Emsco made a voluntary assignment for the benefit of its creditors on October 20, 1966, to Thomas W. Moore, Jr. It was stipulated that "All of the * * * claims

were finalized [1] as to exact amounts after the aforesaid assignment." The assets in the hands of the assignee were insufficient to discharge all claims in full. The United States brought an action against the assignee and asserted priority under 31 U.S.C.A. § 191.[2] The district court concluded that the statute gave priority and entered judgment for the United States. The assignee has appealed.

[1, 2] The question to be decided is whether there were "debts due to the United States" from Emsco at the time it made its assignment for the benefit of creditors. The statute providing priority and the phrase "debts due" are not new. The present statute is not very different from the version incorporated in the revised statute.[3] The phrase is, it seems, included

[1] "finalize to put into final form; to complete,

"Usage: Finalize is closely associated with the language of bureaucracy in the minds of many careful writers and speakers and is consequently avoided by them." American Heritage Dictionary, 1969, p. 492. As used in the stipulation the word means determined and agreed upon.

[2] "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed." 31 U.S.C.A. § 191.

[3] "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed." R.S. § 3466.

in an Act of Congress of 1797. See *Prince* v. *Bartlett*, 12 U.S. (8 Cranch) 431, 3 L.Ed. 614. The word "debt" has been many times defined and given many varied meanings. The definitions range from the duty to return a social courtesy to legal obligations of many kinds. 26 C.J.S., p. 1, Debt, et seq. It has been said that a debt is an obligation to render something to someone else. In searching for the meaning of a term of so many different meanings in different contexts, we look to the meaning which it had when it was used in the first priority statute enacted by the Congress. At that time the basic law of all of the states, both substantive and procedural, was the common law. One of the common law actions was the action of debts. "The action of debt lies where a party claims the recovery of a debt, i.e. a liquidated or certain sum of money alleged to be due to him." Stephen, Principles of Pleading, 8th Am. Ed., p. 13, 1859. Such was the meaning of the word "debt" at the time of the earliest priority enactment. Such is the meaning of the word in the present statute. The United States had claims for damages for breach of contract. The stipulation expressly states that the claims were not finalized when the assignment was made. The claims were not for sums certain or which could be made certain by mathematical computation. They were not liquidated. Because the claims of the United States were not for fixed and certain amounts and presently payable, they were not debts due.

Since it is here determined that the claims of the United States were not "debts due," the judgment of

the district court will be reversed and the cause remanded for further appropriate proceedings.

Reversed and remanded.

COLEMAN, *Circuit Judge,* Separate Opinion.

Judges Jones and Thornberry reach diametrically opposing results as to how the issue raised in this appeal should be decided. Their written opinions reflect the precedential murkiness surrounding the question. Neither cites a case squarely in point. Thus, they are left to reason from other premises. Obviously, I find myself similarly situated.

I am impressed by the fact that this statute has been on the books since March 3, 1797, and all along the language has remained the "same" or "equivalent", *United States* v. *Oklahoma,* 261 U.S. 253, 43 S.Ct. 295, 67 L.Ed. 638. Thus, it would appear, Congress has considered it adequate to the consummation of its fundamental purpose, which the courts have described as the "protection of the government's revenue". It has been content to rely on debts; it has not seen fit to expand the language to include "claims" or such like.

I note, too, that this statute is codified in the official version of the United States Code, United States Government Printing Office, 1971, Chapter 6 of Title 31, under the heading, "Debts Due By, or To, The United States".

Stripped of language inapplicable to the issue which must be decided, 31 U.S.C. § 191 may be read as follows:

> Whenever any person indebted to the United States is insolvent * * * *, the debts due to the United States shall be first satisfied. (emphasis added).

In other words, there must not only be a "debt", but it must be "due".

Let us now look at the case.

In its brief the Government says, "The original claims were against the assignee and Emsco for breach of contract" (emphasis mine). When did the "claim" ripen into a "debt due"? My answer to this has to be, "not until the amount of the damages for the breach had been ascertained by someone with the appropriate jurisdiction to make a determination binding on both the claimant and the defendant".

The contract which ultimately gave rise to this "debt" (or claim, as the case may be) was made in June, 1966. The contract was an obligation, according to its own terms, but I doubt that either in 1797 or today it could be "liberally construed" to be a debt. The default spawned a claim for breach of the contract, but, again, I cannot construe a claim to be a debt, although it most certainly may ripen into one, as it did here. A claim cannot be a "debt due" until the amount has been ascertained. The assignment for the benefit of creditors was made on October 20, 1966. I have no hesitancy in saying that on that date the United States was not the owner of a debt due from Emsco. It had only a claim. To this point, therefore, I am in agreement with the views expressed by Judge Jones.

I read *Massachusetts* v. *United States,* mentioned in Judge Thornberry's opinion, to mean that priority is to be determined as of the date of the insolvency, not retroactively. The amount owed by Emsco as damages for its default was not finally ascertained until 1973, about seven years after the insolvency.

I, therefore, concur in the reversal of the judgment below and remand for further proceedings.

THORNBERRY, *Circuit Judge* (dissenting):

In this case we are called upon to construe the meaning of "debts due to the United States" as used in 31 U.S.C.A. § 191 (hereinafter the "Priority Stat-

ute"). In selecting among the various definitions of "debt" that have been applied in varying contexts, the majority inexplicably turns to the highly technical definition of the common law action of debt. In so doing the majority fails to construe the statute, in accordance with guidance from the Supreme Court, breaks with prior judicial interpretation without discussing the relevant cases, and creates an unexplained and unwise deviation from the interpretation of the term under the Bankruptcy Act, despite the analogous factual bases for application of the two statutes. Therefore, with deference, I dissent.

The Priority Statute is founded on the public policy of securing an adequate revenue to sustain public burdens and discharge the public debts. *United States* v. *State Bank of North Carolina,* 1832, 6 Pet. (31 U.S.) 29, 8 L.Ed. 308; *Small Business Administration* v. *McClellan,* 1960, 364 U.S. 446, 81 S.Ct. 191, 5 L.Ed. 2d 200; *City of Sherman* v. *United States,* 5 Cir. 1968, 400 F. 2d 373; *Viles* v. *Commissioner of Internal Revenue,* 6 Cir. 1956, 233 F. 2d 376. The statute is to be liberally construed in order to effectuate that purpose. *United States* v. *State Bank of North Carolina, supra; Bramwell* v. *United States Fidelity & Guaranty Co.,* 1926, 269 U.S. 483, 46 S.Ct. 176, 70 L.Ed. 368; *United States* v. *Emory,* 1941, 314 U.S. 423, 62 S.Ct. 317, 86 L.Ed. 315; *United States* v. *Gotwals,* 10 Cir. 1946, 156 F. 2d 692; *Lakeshore Apartments, Inc.* v. *United States,* 9 Cir. 1965, 351 F. 2d 349. By adopting a narrow, technical definition of "debt" so as to defeat the United States' priority, the majority, it seems to me, flies in the teeth of these well established general principles of construction.

The few cases that have directly considered whether the Priority Statute applies to unliquidated obligations also point toward an affirmative answer. The

strongest case support for the majority's position is *Massachusetts* v. *United States,* 1948, 333 U.S. 611, 68 S.Ct. 747, 92 L.Ed. 968, where the Court held that the option of an assignee for the benefit of creditors to pay state unemployment compensation taxes and take credit against federal taxes was cut off by the insolvency of the debtor. In rationalizing this result, the Court appeared to adopt a narrow definition of "debt" for purposes of the Priority Statute.

> [I]t is at least doubtful on the statute's wording that obligations wholly contingent for ultimate maturity and obligation upon the happening of events after insolvency can be said to fall within the reach of "debts due" as of the time of insolvency.

333 U.S. at 626–627, 68 S.Ct. at 756. In footnote 26, the Court explained further.

> [The fact that] all of the decisions sustaining the priority were for debts clearly due and owing, adds force to the clear inferences implicit in the statute's wording, viz., that Congress not only created a conclusive priority attaching as of the time of insolvency but in doing so drew the line for its operation close to, if not at, the commonly accepted meaning of "debt" as distinguished from other forms of obligation.

68 S.Ct. at 756–757. The *Massachusetts* case does not directly support the majority's result in this case, however, since there the Court's primary concern was the contingency of the very fact of liability. In our case, all the events necessary to fix liability for the excess cost of reprocurement had occurred prior to insolvency, as the majority opinion makes clear. This liability was not contingent in any sense; it was merely unliquidated in amount. Therefore it was not the sort of obligation excluded from the coverage of the Priority Statute in *Massachusetts.*

Two cases have given priority to government claims that were wholly unliquidated at the time of insolvency. In *King* v. *United States,* 1964, 379 U.S. 329, 85 S. Ct. 427, 13 L.Ed.2d 315, the Seeley Tube & Box Company filed a petition for reorganization under Chapter XI of the Bankruptcy Act. Soon thereafter the United States notified Seeley that it intended to terminate two contracts between Seeley and the Picatinny Arsenal due to Seeley's default. King, Seeley's president, was appointed as distributing agent. He distributed the bulk of the assets with court approval before the United States liquidated its claim by reletting the contracts at a higher cost. As a consequence, there were insufficient funds remaining to pay all of the Government's claim. Under these circumstances the Court held King's estate liable for the unpaid portion because the Government's claim, though unliquidated at the time of insolvency, had been entitled to its statutory priority. The implicit holding that an unliquidated claim may be a "debt" within the Priority Statute so long as it is capable of liquidation is not directly controlling here, despite the identity of factual settings, since it was not a disputed issue in the case, King having admitted the Government's priority in oral argument. *See United States* v. *L.A. Tucker Truck Lines, Inc.,* 1952, 344 U.S. 33, 73 S.Ct. 67, 97 L.Ed. 54; *United States* v. *Mitchell,* 1926, 271 U.S. 9, 46 S.Ct. 418, 70 L.Ed. 799; *Webster* v. *Fall,* 1925, 266 U.S. 507, 45 S.Ct. 148, 69 L.Ed. 411. Nevertheless the *King* case provides some support for the proposition that an unliquidated claim may be a "debt" within the Priority Statute, as the district court in our case noted.

Finally, in *United States* v. *Barnes,* C.C., S.D.N.Y. 1887, 31 F. 705, the court held that a claim of the United States had been entitled to its priority despite

the fact that the amount of the claim was the subject of pending litigation both at the time of adjudication of bankruptcy and of distribution of the debtor's assets. The court said plainly that unliquidated claims of the Government are entitled to priority.

> It is established by many adjudications, in which the meaning and effect of these provisions have been discussed, that such priority extends to all classes of debts, whether liquidated or unliquidated, joint or several, legal or equitable * * *.

Id. at 707. The antiquity of the case, coupled with its explicit reliance on prior adjudications, undercuts the majority's assertion that its narrow definition was "the meaning of the word 'debt' at the time of the earliest priority enactment." On the contrary, a broad and liberal interpretation of the term was the rule from the first, a rule from which the majority departs today.

The Bankruptcy Act's analogy also points strongly toward allowance of priority for claims that are unliquidated as of the time of insolvency. In relevant part, the Act provides that

> The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be * * * (5) debts owing to any person, including the United States, who by the laws of the United States i[s] entitled to priority * * *

11 U.S.C.A. § 104(a). The Act also provides that

> Debts of the bankrupt may be proved and allowed against his estate which are founded upon * * * (8) contingent debts and contingent contractual liabilities * * *.

11 U.S.C.A. § 103(a). Unliquidated claims are also provable and allowable, so long as the amount of the claim can be fully liquidated or estimated within the time set by the court. 11 U.S.C.A. § 93(d); 1 Collier Bankruptcy Manual, ¶ 57.11 (2d ed. 1973).

Both the Bankruptcy Act and the Priority Statute apply to disposition of assets that are insufficient to meet all of the debtor's liabilities. The issue under both statutes is whether obligations to the United States will be first satisfied in full or only satisfied in the same proportion as other obligations. The public policy of securing an adequate revenue so as to sustain public burdens and discharge public debts applies equally under both statutes. The Government is entitled to fifth priority in Bankruptcy Act proceedings for debts unliquidated at the time of insolvency solely by virtue of the existence of the Priority Statute, which is the only law of the United States giving priority to debts owing to the United States within the meaning of 11 U.S.C.A. § 104(a). 1A Collier Bankruptcy Manual, ¶ 64.501 (2d ed. 1973). It seems to me that Congress has clearly shown what it means when it uses the term "debts" in this factual context in § 63 of the Bankruptcy Act, 11 U.S.C.A. § 103, and that definition clearly includes the sort of unliquidated obligation involved in this suit, so long as the claim can be liquidated or estimated, as it was in this case, within a reasonable time so as to avoid undue delay in distributing the debtor's assets to the creditors. I think we should apply this entirely sensible reading of the term absent some good reason to deviate, and no good reason, in my opinion, has been offered.

APPENDIX B

In the United States Court of Appeals for the Fifth Circuit

OCTOBER TERM, 1973

No. 73-2951

D.C. Docket No. 72-H-164

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

THOMAS W. MOORE, JR., ASSIGNEE FOR BENEFIT OF CREDITORS OF EMSCO SCREEN PIPE COMPANY OF TEXAS, ET AL., DEFENDANTS-APPELLANTS

Appeal from the United States District Court for the Southern District of Texas

Before JONES, THORNBERRY and COLEMAN, CIRCUIT JUDGES

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District

Court for further proceedings in accordance with the opinion of this Court;

It is further ordered that plaintiff-appellee pay to defendants-appellants, the costs on appeal to be taxed by the Clerk of this Court.

JULY 26, 1974.

COLEMAN, *Circuit Judge,* specially concurring.

THORNBERRY, *Circuit Judge,* dissenting.

Issued as Mandate: August 9, 1974.

APPENDIX C

In the United States District Court for the Southern District of Texas, Houston Division

Civil Action No. 72-H-164

UNITED STATES OF AMERICA, PLAINTIFF

v.

THOMAS W. MOORE, JR., ASSIGNEE FOR BENEFIT OF CREDITORS OF EMSCO SCREEN PIPE COMPANY OF TEXAS, INC., EMSCO SCREEN PIPE COMPANY, INC., DEFENDANTS

FINAL JUDGMENT

Came on for trial by the Court on the 29th day of May, 1973 the above-entitled action, and the parties having stipulated to the facts and having presented oral arguments, and the Court having fully considered the above, as well as the briefs submitted by the parties, and the Court having found that the plaintiff, the United States of America, is entitled to absolute priority with regard to the distribution of the assets of Emsco Screen Pipe Company, Inc. up to full amount of its claims which to date total SIXTY-SEVEN THOUSAND THREE HUNDRED THIRTEEN and 70/100 DOLLARS ($67,313.70) including interest on the Navy claim to June 1, 1973, it is hereby

I.

ORDERED, ADJUDGED and DECREED that the United States of America have and recover of the defendant, Emsco Screen Pipe Company of Texas, Inc. and defendant, Thomas W. Moore, Jr., assignee for the benefit of creditors of Emsco, jointly and severally, the sum of FIFTY-FIVE THOUSAND SEVEN HUNDRED SEVEN and 28/100 DOLLARS ($55,707.28). The right to recovery of the above sum is without prejudice to the further right of the United States, upon final distribution by the assignee, to the funds representing the interest on the aforementioned principal amount to the extent that such funds are not applied by the defendant, Thomas W. Moore, Jr., for the purposes of administering the Emsco estate under assignment, and for pursuing the defense of this action in higher courts.

II.

It is further ORDERED, ADJUDGED and DECREED that the United States of America have and recover of Emsco Screen Pipe Company of Texas, Inc. the additional sum of ELEVEN THOUSAND SIX HUNDRED SIX and 42/100 DOLLARS ($11,606.42) plus interest at the rate of six percent (6%) per annum from the date of judgment until paid. Any amounts paid upon distribution by Thomas W. Moore, Jr. to the United States of America over and above FIFTY-FIVE THOUSAND SEVEN HUNDRED SEVEN and 28/100 ($55,707.28) shall be subtracted from the amount of the judgment against Emsco contained in this paragraph.

III.

It is also ORDERED, ADJUDGED and DECREED that interest at the rate of six percent (6%) per annum from the date of this judgment until paid shall, as pertains to paragraph I of this judgment, be assessed only as to Emsco Screen Pipe Company and not as to Thomas W. Moore, Jr.

IV.

It further appearing to the Court that the claims made the basis of this action comprise: 1) a claim by the Navy in the amount of FORTY THOUSAND SIX HUNDRED SEVEN and 13/100, plus interest of FIFTEEN THOUSAND SIX HUNDRED THIRTY-THREE and 75/100 DOLLARS ($15,633.75) to June 1, 1973; 2) a claim by the Army for FIVE THOUSAND DOLLARS ($5,000.00); and 3) a claim by the Defense Supply Agency for SIX THOUSAND SEVENTY-TWO and 82/100 DOLLARS ($6,072.82); it is hereby

ORDERED, ADJUDGED and DECREED that the Army, Navy and Defense Supply Agency shall share the proceeds of this judgment on a pro rata basis based on the amount of the claim of each, as set out above, on the date of this judgment.

V.

Pursuant to the Stipulation filed herein by the parties, it is

ORDERED, ADJUDGED and DECREED that no execution or levy shall issue on this judgment until all avenues of appeal have been exhausted or until a stipulation by the parties is filed herein stating that no further appeal will be taken. Defendants shall not be required to file a supersedeas bond.

DONE at Houston, Texas this 30th day of May, 1973.

PETER T. FAY,
United States District Judge.

Approved as to form:
ANTHONY J. P. FARRIS,
United States Attorney
HELEN M. EVERSBERG,
Assistant United States Attorney.
THOMAS OSA HARRIS,
By HELEN M. EVERSBERG,
Attorney for Defendants.

U.S. GOVERNMENT PRINTING OFFICE: 1974